Decision _____

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Communications Workers of America, Local 9415, Kathleen Kinchius, President, Complainant, vs. Pacific Bell, (U 1001 C), Defendant.	Case 92-04-007 (Filed April 3, 1992)

DECISION DISMISSING COMPLAINT PURSUANT TO THE PARTIES' STIPULATION

This decision dismisses the complaint herein pursuant to the Stipulation and Request for Dismissal filed by the parties on November 18, 2003.

Background of the Case

As the caption indicates, this unusual case is 12 years old, and arises out of a challenge by Local 9415 of the Communications Workers of American (CWA) to certain practices used by Pacific Bell (Pacific or SBC)[1] in the early 1990s while

[1] As the caption indicates, the originally-named defendant in this case was Pacific Bell. After the merger of Pacific Telesis Group and SBC Communications, Inc. in 1997 (as authorized in Decision (D.) 97-03-067), defendant changed its name to Pacific Bell Telephone Company. In late 2002, Pacific Bell Telephone Company began doing business as SBC California. For the period up to September 2002, this ruling will refer to the defendant as Pacific; for the period after that time, defendant is referred to as SBC.

monitoring calls between Pacific's customers, on the one hand, and its service representatives and operators, on the other. In a series of decisions dating back to the 1960s, this Commission had developed detailed rules that governed how monitoring was supposed to be conducted.

Before hearings were held in June 1993, there were two prehearing conferences (PHCs), an amended complaint, a motion to dismiss the amended complaint that was granted in part, and finally a letter stipulation whereby CWA withdrew virtually all of the specific monitoring violations it had alleged, and the parties agreed to submit four general questions for decision. These questions were as follows:

1. Whether "remote" monitoring (*i.e.*, monitoring from rooms or locations separate from the work area) impermissibly deprived customers and employees of notice that their calls were being monitored;
2. Whether the training and forms used by Pacific for monitoring encouraged persons doing the monitoring to take down an impermissibly full amount of the monitored conversations, in violation of previous Commission rulings;
3. Whether Pacific's training of its employees on monitoring principles was sufficient to give the employees notice that some of their calls might be monitored, and otherwise to comply with Commission training requirements; and
4. Whether Pacific's proposed use of a taped announcement to notify customers that some of their calls might be monitored would be sufficient under General Order (GO) 107-B to allow Pacific to make verbatim notes of the monitored conversations, and to relay these notes to the monitored employees and their supervisors.

Following submission of the stipulation with these four questions, hearings were held on June 10-11, 1993. Shortly after the hearings were concluded, and before briefs were submitted, the assigned Administrative Law

Judge (ALJ) issued a ruling that concluded the fourth issue described above should not be briefed.[2] The ALJ reached this conclusion because Pacific had not yet submitted an advice letter to the Commission Advisory and Compliance Division (CACD) seeking approval to use an Automatic Response Unit (ARU), the device that made taped announcements possible. After noting that such an advice letter was "the proper way" of obtaining Commission approval to use ARU technology, the ALJ said:

> "Under sections III.G.4. and III.H. of the Commission's General Order 96-A, advice letters must be served on interested parties who request them, and a 20-day period is allowed for protests. Since complainant's [*i.e.*, CWA's] interest in the ARU technology is obvious, it is to be expected that any advice letter concerning this subject will be served on complainant. The opportunity for protest will afford complainant a chance to raise with CACD any concerns it may have about use of the ARU technology for giving notice of monitoring." (July 27, 1993 Ruling, pp. 1-2.)

In keeping with the ALJ's ruling, the parties submitted opening briefs on the other issues that had been litigated on July 30, 1993, and reply briefs on August 24, 1993. Pacific submitted Advice Letter No. 16691 to CACD seeking approval to use the ARU, but the advice letter was protested by CWA, and Pacific withdrew it on January 23, 1998.[3]

The ALJ Rulings in 2002 and 2003

Even though hearings had been held and the case had been briefed, no Commission decision resolving the case was issued between 1993 and 2002. On

[2] Administrative Law Judge's Ruling Denying Motion to Strike Testimony, issued July 27, 1993.

September 17, 2002, the assigned ALJ issued a ruling asking the parties to comment on whether the record was too stale to justify a decision.[4] Staleness might be an issue, the ALJ continued, because the hearing had been held nine years earlier, and had been devoted largely to the adequacy of Pacific's training on monitoring principles and to the forms used during monitoring, things that might have changed in the intervening decade. The parties were invited to file comments on whether they considered it appropriate to dismiss the case without prejudice, and if they did not, to specify which issues still required resolution.

Pursuant to this invitation, CWA filed comments on October 1, 2002, and SBC filed reply comments on October 16, 2002. In its comments, CWA argued that it was entitled to a decision on the existing record, and that the September 17, 2002 ruling unfairly placed the burden on CWA to demonstrate that the record was not stale. CWA also argued that the record on three of the four questions that had been litigated in 1993 — the validity of remote monitoring, the validity of Pacific's monitoring checklists, and the adequacy of the monitoring training that Pacific gave to its service representatives and operators — was sufficiently fresh that a decision could be based upon it. SBC, on the other hand, argued that since its monitoring training and forms had both changed substantially over the past decade, the record was stale and the case should be dismissed. However, SBC continued, the use of ARU technology had become common among SBC's competitors during that time, and SBC requested

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[3] On January 8, 1999, Pacific filed Advice Letter No. 19953, which proposed to amend Pacific's tariffs in a manner similar to the authority sought in Advice Letter No. 16691.

[4] Administrative Law Judge's Ruling Proposing Dismissal, issued September 17, 2002.

the Commission to make a clear statement in the order of dismissal authorizing SBC to use ARU technology, as well.

Owing to the substantial difference of opinion between CWA and SBC, the ALJ issued another ruling on November 27, 2002.[5] This ruling directed the parties to meet and confer for the purpose of determining which portions of the 1993 hearing record, if any, were sufficiently relevant to SBC's current training and practices on monitoring so that a decision based on them would not amount to an advisory opinion. (*Mimeo.* at 6-7.) The ALJ directed CWA and SBC to submit a report about their meetings (or, if they could not agree, separate reports), and the ALJ would then advise them whether dismissal seemed appropriate, or whether a PHC would be held so that a schedule for a supplementary hearing could be set.

The parties held their meet-and-confer sessions in January 2003 and submitted separate reports to the ALJ shortly thereafter. Based on these reports, the ALJ issued another ruling on June 16, 2003,[6] which ordered that because of the differences between the parties, a PHC would be necessary. In his ruling, the ALJ noted that while CWA argued the 1993 hearing record was sufficiently fresh on the first three questions set forth above, SBC argued that the subsequent developments – including new labor agreements between the parties – had rendered significant portions of the 1993 record irrelevant.[7]

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[5] Administrative Law Judge's Ruling Directing Parties to Meet and Confer, issued November 27, 2002.

[6] Administrative Law Judge's Ruling Convening Prehearing Conference, issued June 16, 2003.

[7] Specifically, SBC argued that a 1995 Memorandum of Agreement (MOA) entered into between Pacific and CWA on the subject of supervisory monitoring amounted to

Footnote continued on next page

The June 16, 2003 ruling also concluded that despite the ALJ ruling of July 27, 1993, the use of ARU technology should be considered an issue in this case. After noting that it had been the Commission's policy for at least a decade to deal with important public policy questions through applications or adjudication rather than advice letters, the ALJ concluded that it made sense to address the ARU issue in this case, "inasmuch as it has been raised here and this proceeding appears to furnish nearly as good a vehicle for resolving the matter as would an application." (*Mimeo.* at 13.) Another reason for addressing the ARU issue now, the ALJ noted, was that the use of this technology raised principally questions of law rather than questions of fact:

> "It seems evident from the complainant's status report . . . that CWA does not dispute that recorded messages saying 'your call may be monitored for quality assurance purposes' are ubiquitous today, even among utilities regulated by this Commission . . . In view of how common these messages have become, the principal issue about their use by SBC may be whether the utility's customers now have any reasonable expectations that their calls with service representatives will *not* be monitored. Further, because there seems to be no dispute about the ubiquity of ARU-generated messages to callers regarding monitoring, the California Supreme Court's opinion in *Hill v. National Collegiate Athletic Assn.*, 7 Cal.4th 1 (1994), as well as other privacy cases, suggest that this expectation-of-privacy issue can be resolved as a matter of law." (*Mimeo.* at 14; footnote and citation omitted.)

CWA's tacit consent to several of the remote monitoring practices the union had challenged during the 1993 hearings. (*Mimeo.* at 5-6.) CWA argued that the MOA and a related "best practices package" were irrelevant to the issues in the case. (*Id.* at 8-9.)

The July 31, 2003 PHC and the Movement Toward Settlement

The PHC required by the June 16 ruling was held on July 31, 2003. After an extensive discussion, it was agreed that a supplementary hearing to update the 1993 record would be held on November 17 and 18, 2003. On the issue of remote monitoring, the principal difference between the parties concerned the relevance of the MOA described in footnote 7 on how remote monitoring was now being conducted by SBC. On the question of monitoring training and the forms used for monitoring, SBC agreed that its supplementary testimony would bring its 1993 showing up-to-date. (July 31, 2003 PHC Transcript, pp. 99-101.)

On the issue of ARU technology, CWA agreed that it would take a clear position in briefing on whether it considered the use of recorded announcements to be permissible under the language of General Order (GO) 107-B, and SBC agreed to submit testimony on how other local exchange carriers controlled by SBC were handling the issue. SBC also agreed that its supplementary testimony would cover an agreement that SBC had negotiated with CWA providing for a trial of ARU technology in two of SBC's local offices, an agreement that the ALJ noted might be relevant on the issue of whether any restrictions should be imposed on the use of ARU technology. (*Id.* at 101-103.) The parties also agreed that they would continue meeting for the purpose of developing additional stipulations that might shorten the supplementary hearing.

On September 19, 2003, counsel for SBC sent the ALJ an e-mail message stating that the parties had conferred, and that they appeared close to settling most of the issues that were to be addressed in the supplementary hearing. After additional conferences, the parties informed the ALJ in late October that they had agreed to settle all of the issues in the case, and that they would file a stipulation

and request for dismissal in the near future. As noted above, the joint stipulation and request for dismissal were filed on November 18, 2003.

Description of the Parties' Stipulation

The essence of the parties' settlement agreement is set forth in the first four paragraphs of the November 18 stipulation, in which the parties refer to defendant as "SBC California" and replace references to ARU technology with "IVR," which stands for Interactive Voice Recording. The four key paragraphs are as follows:

> "(1) The issues regarding remote monitoring will become moot upon the modification of an [IVR,] which will provide notice to customers and to employees and which will resolve the privacy questions raised during this proceeding.
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> "(2) SBC California will modify the observation form used in [monitoring] to include the following language: 'Any written comments that contain the comments, substance, purport, effect, or meaning of any observed conversation, unless secrecy of communications, fraud, or loss of revenue is involved, are strictly prohibited.' A true and correct copy of the modified observation/checklist form is attached as Exhibit A.
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> "(3) SBC California, through its Consumer Marketing Group managers, will receive CWA-initiated questions or concerns related to monitoring practices at meetings held under Article 7 ('Problem Resolution Procedures') of the CWA Agreement with SBC California [dated March 16, 2001]. SBC California has designated a single point of contact to investigate inquiries related to monitoring practices and when necessary, to provide necessary training or coverage for completion.
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> "(4) SBC California has filed, with the concurrence of CWA, an advice letter and tariff with the Commission, which modifies an [IVR] message to include an announcement to the customer that his or her call may be monitored

> and/or recorded for quality assurance and which allows the customer to opt-out of having the call monitored or recorded. A true and correct copy of the letter and the tariff are attached as Exhibits B and C." (November 18 Stipulation, pp. 2-3.)

On November 19, 2003, SBC filed Advice Letter No. 24376, the advice letter referred to in the last paragraph quoted above. The advice letter describes the proposed tariff change as follows:

> "SBC, with the concurrence of [CWA], will begin a six-month trial in one customer service office to test a new process to monitor and/or record customer interactions with Service Representatives. The purpose of this advice letter is to add to the tariffs that the [IVR] message will be updated with an announcement to the customer that their call may be monitored and/or recorded for quality assurance. This announcement will stay in place until such time as the Company ceases to monitor and/or record calls. We expect this process to result in improved customer service and efficiency through additional coaching and training of our representatives."[8]

On December 19, 2003, SBC responded to a series of data requests from the Commission's Telecommunications Division asking for further details about the proposed IVR message and how it would be used. According to the data responses, the recorded message a customer will hear is as follows:

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[8] The attached tariff sheet amends Rule 30, which deals with the monitoring of telephone conversations, to add an IVR message as one of the four ways in which proper notice of monitoring can be given. The tariff change states that "the IVR message will inform customers that the call may be monitored or recorded for quality assurance purposes and will allow a customer to opt-out of having the call monitored or recorded."

> "To ensure quality service, your call may be monitored or recorded. If you do not wish to be monitored or recorded, please advise your SBC Representative."

SBC's responses also indicate that if a customer states that he or she does not wish to be recorded, "the SBC Representative will transfer the call to a non-recorded employee."

Another issue in the data requests was how long SBC intended to maintain the recordings of monitored telephone conversations, as well as notes based on these recordings. On this issue, defendant states:

> "SBC, with concurrence from [CWA], intends to maintain the recordings for a maximum of 30 days. When the recording is used by management to substantiate disciplinary action, it will be retained for 90 days, transcribed by a manager, and maintained with the employee's performance documentation. Within the 90-day window and upon request from the Union, the recording will be used in problem-solving or as part of the grievance procedure. All recordings will be recorded over (*i.e.*, previous recordings destroyed) following either the 30-day or 90-day periods."

Finding these responses satisfactory, the Telecommunications Division raised no objection to the tariff changes proposed in Advice Letter No. 24376, which went into effect on December 29, 2003.

Discussion

The Commission has ruled that when hearings have been held in a matter, dismissal of the case is not a matter of right, but rests within the Commission's sound discretion. *See*, D.95-03-044, *Re United Parcel Service, Inc.*, 59 CPUC2d 103, 107-08; D.92-04-027, *Re Southern California Gas Company*, 43 CPUC2d 639, 641. In this case, we agree with the parties that a dismissal with prejudice is appropriate, because the stipulation they have reached represents a reasonable resolution

under today's conditions of the monitoring issues that were originally litigated in 1993.

We commend the parties for recognizing that with the widespread use of IVR (or ARU) technology in the telecommunications industry today, some of the discussion in our decisions from the 1960s and 1970s about how detailed the notes of monitored conversations may be has become outdated.[9] With the use of IVR technology, the customer is placed on notice that his or her call may be monitored and/or recorded for quality assurance purposes, and under the trial program provided for in Advice Letter No. 24376, the customer has the option of requesting that the call not be monitored or recorded.

We also think that SBC's arrangements for retaining the recordings of monitored calls for either 30 or 90 days, as described in the data response, strikes a reasonable balance between the utility's need to have the recordings available for coaching and disciplinary purposes, and the customer's privacy interest in ensuring that such recordings are retained no longer than necessary. We also note that since the IVR message about recording calls is being used by SBC on a trial basis only, there will be an opportunity to adjust the retention periods for recordings of monitored conversations if the time periods set forth in SBC's data response are found to intrude upon customer privacy unduly.

[9] Even though use of the IVR message seems likely to make the recording of monitored calls the norm in the future, we are pleased that one aspect of the parties' agreement is that insofar as SBC continues to use the observation/checklist form referred to in the second paragraph of the November 18 stipulation, the requirement that the substance of monitored conversations not be taken down – as set forth in decisions such as D.73146 (67 CPUC 528, 552-53) and D.88232 (83 CPUC 149, 155-181) -- will be observed.

Finally, we are pleased that CWA and SBC have agreed upon a procedure for addressing CWA's concerns about monitoring through the problem resolving procedures set forth in the parties' 2001 labor agreement. We think the designation of a single "point of contact" to investigate monitoring inquiries and to provide necessary training should serve to reduce the number of disputes about monitoring practices, and to ensure that any disputes which do arise are dealt with expeditiously.

Because the parties' stipulation strikes a reasonable balance among the factors that need to be considered in this case, and because its provisions for recording customer conversations are subject to adjustment in the light of experience, we conclude that it is a reasonable exercise of our discretion to grant the proposed dismissal. Further, since this proceeding is now uncontested and we are granting the requested relief, public review and comment regarding the draft decision is waived pursuant to Pub. Util. Code § 311(g)(2).

Assignment of Proceeding

Carl Wood is the Assigned Commissioner and Kirk McKenzie is the Administrative Law Judge in this proceeding.

Findings of Fact

1. Hearings in this case were held on June 10 and 11, 1993.
2. Following a PHC on July 31, 2003, SBC and CWA filed a joint stipulation and request for dismissal on November 18, 2003.
3. Pursuant to the joint stipulation and request for dismissal, SBC filed Advice Letter No. 24376 on November 19, 2003.
4. Advice Letter No. 24376 took effect on December 29, 2003.

Conclusions of Law

1. The six-month experiment calling for the use of an IVR message to inform customers that their calls to SBC service offices may be recorded, as provided for in Advice Letter No. 24376, is reasonable.

2. The provision in Advice Letter No. 24376 giving the customer notice that he or she may opt out of having the call to the service representative monitored and/or recorded, is reasonable.

3. The 30-day and 90-day periods for retaining recordings of customer calls, as described in SBC's December 19, 2003 responses to the data requests of the Telecommunications Division, strike a reasonable balance between customer privacy concerns, on the one hand, and the utility's need to use such recordings for coaching and disciplinary purposes, on the other.

4. The other provisions in the November 18, 2003 joint stipulation and request for dismissal are reasonable.

5. The parties' request for dismissal of this case with prejudice should be granted.

6. Public review and comment on the draft decision should be waived.

O R D E R

IT IS ORDERED that:

1. Pursuant to the Joint Stipulation and Request for Dismissal filed by the parties to this case on November 18, 2003, the amended complaint in this proceeding is dismissed with prejudice.

2. Public review and comment regarding today's decision is waived.

3. This proceeding is closed.

This order is effective today.

Dated _____, at San Francisco, California.